IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 324 OF 2000

THE DELPHIS BANK LIMITED …………......................................PLAINTIFF

-V E R SU S-

ALLIED WHARFAGE LIMITED …...DEFENDANT

RULING

ON DEFENDANT'S NOTICE OF MOTION DATED 13TH NOVEMBER 2012

BACKGROUND

1. Plaintiff sued the Defendant seeking judgment for USD 127,427.00 plus interest at 15% per annum. This case was filed on 17th July 2000.

2. Plaintiff pleaded that it had advanced financial facilities to a company called Seyffert & Company Limited (**Seyffert**) and as security Seyffert charged its tea by two Debentures.

3. It is pleaded that in view of Seyffert's failure to remit to Plaintiff the proceeds of its tea sales, Plaintiff threatened to appoint a Receiver to take possession of Seyffert's assets. Seyffert averted Plaintiff's said action by agreeing to direct the Defendant, which was in business of Warehouse in Mombasa, to hold Seyffert's tea to the order of Plaintiff.

4. That on or about 26th June 1998 the Defendant on instructions of Seyffert as at 26th June 1998 attorned to Plaintiff in writing that Defendant would hold the Seyffert's tea to the order of Plaintiff and Defendant further undertook/attorned not to release that tea except on written instructions of the Plaintiff.

5. Plaintiff pleaded that Defendant intended or knew that the Plaintiff on reliance of that attornment would not take any action against Seyffert.

6. That in breach the Defendant, inspite demand by Plaintiff, failed to release to Plaintiff tea valued at USD 107,131.40 which amount accrued interest, at 15% from 16th March 1999, of total USD 20,295.60. It is that amount Plaintiff seeks judgment be entered in its favour.

7. Defendant denied Plaintiff's claim by its Defence filed on 3rd January 2001.

8. Defendant by that Defence pleaded that the lists of Seyffert's teas as at 26th June 1998 included

teas that were expected at Defendant's warehouse at a future date and also teas that had been shipped in accordance to Seyffert's instructions. That, the lists, were prepared at the behest of Seyffert and that the Notation placed on those lists which was to the words-

> **"These teas will be held by us pending further shipping/disposal instructions in writing by M/s Delphis Bank Ltd."**

was done and handed over to Seyffert by Defendant's employee namely Mr. G. Kapacee, who was not authorized to do so. Defendant therefore denied that the said lists contained its assurances to Plaintiff or that Plaintiff suffered any loss as pleaded.

9. Further Defendant pleaded, that through its Director Sanghri, it reached an agreement with Plaintiff's Branch Manager, Mr. S. Patel, that a full tally of the teas held on behalf of Seyffert, by Defendant, be carried out in October 1998, and such tally be accepted as the tea stored on Seyffert's account. That thereafter all the teas were released to Plaintiff's appointed Receiver of Seyffert who accepted them in full satisfaction of any claim by Plaintiff against the Defendant. Parties have confirmed that the then Receiver of Plaintiff was Mr. Mahendra F. Gandhi.

THE NOTICE OF MOTION

10. The Notice of Motion dated 13th November 2012 is for the following prayers-

a. **That this Honourable Court be pleased to order the Plaintiff to show cause why the suit herein should not be dismissed.**
b. **That if no cause is shown to the satisfaction of this Court, this Honourable Court be pleased to dismiss the Plaintiff's suit herein with costs for want prosecution.**

11. The affidavit in support of the application is sworn by Mukesh Sanghavi, Defendant's Director. In that affidavit he deponed that the last step taken in this suit was by Defendant when Defendant filed Further and Better Particulars of its Defence on 27th May 2003.

12. I would however state that the Plaintiff's Advocate did invite the Defendant's Advocate by letter dated 19th January 2004 to fix the hearing of the suit and a date was indeed fixed for 5th May 2004 when the suit was adjourned at Defendant's Advocate's instance.

13. Defendant through the affidavit of Sanghavi stated thus-

i. **The cause of action pleaded in the Plaint arose in 1998 – over 14**

> **years ago. The claim made is for loss and damage arising out of the Defendant's alleged failure to properly account to the Plaintiff for certain teas stored in the Defendant's warehouse by a third party tea trader, Seyffert & Company Limited.**

ii. **All the material witnesses intended to be relied on by the**

> **Defendant have either left their employment with the Defendant or have died. In particular, Mr. G. Kapacee, the Defendant's go-down supervisor, left employment on 7th February 2000 and I am informed that he passed on at Aga Khan Hospital, Mombasa on 20th February 2004. Mr. P M Chauhan, the Defendant's go-down Manager, retired on 30th April 2003 and he is no longer traceable. Both these witnesses were important to the Defendant's case as they were directly involved in the storage of teas forming the subject matter of this action.**

iii. **The Receiver appointed by the Plaintiff, Mr. Mahendra F. Gandhi,**

died on 25th June 2005. His involvement was, as far as the Defendant's pleaded case is concerned, crucial in that he, as the Plaintiff's appointed Receiver, entered into various agreements with the Defendant concerning the teas held by the Defendant. It is now impossible to cross-examine him.

14. Plaintiff through the affidavit of 4th December 2012 sworn by its Advocate, Sanjeev Khagram, opposed the application.

15. In regard to the last step undertaken by Plaintiff the deponent stated that Plaintiff had filed a Request for Particulars of Defendant's defence which request was filed on 3rd January 2001 but which Defendant failed to respond. That failure necessitated the Plaintiff's Chamber Summons dated 11th March 2003 for an order to be issued to compel the Defendant to supply those particulars. The deponent deponed that the said Chamber Summons was still pending determination before Court.

16. That deposition is not correct because on perusal of the Court file I noted that on 6th May 2003 the Chamber Summons came up for hearing before Justice L. Ouna (as then was) and the parties recorded the following consent-

"BY CONSENT-

1. **The Defendant to furnish Plaintiff [with] all particulars set up in the Request for Particulars dated 3rd January 2001 within 21 days of today.**
2. **Matter to be mentioned on 3rd June 2003 to ascertain if the Defendant has complied with above order failing which the Plaintiff be at liberty to seek unless (sic) orders in terms of paragraph 2 of the Plaintiff's Chamber Summons dated 12th February 2003.**

3. **Costs to Plaintiff."**

That consent was counter signed in the proceedings of this case by the parties Advocates. On 3rd June 2003 when this matter was due to be mentioned there being no representation for any of the parties the Court adjourned the matter generally. It therefore follows that Plaintiff's Chamber Summons seeking further and better particulars of Defendant's defence dated 11th March 2003 was dealt with on 6th May 2003. There was therefore no basis for Plaintiff's Learned Advocate to seek, subsequent to that date, to fix the Chamber Summons for hearing, which they sought to do in July, 2012.

17. Mr. Khagram further deponed that in March 2005 Plaintiff filed its list of documents which was contrary to Defendant's contention that Plaintiff had not taken any step towards ensuring this case does proceed for hearing.

18. Mr. Khagram deponed that Plaintiff had not been able to obtain a hearing date of this suit due to circumstances that are beyond its control which he stated was due to lack of sufficient Judges at the Mombasa High Court and also because of the overwhelming number of cases pending before the Court. To this end he annexed various Notices issued by the Deputy Registrar of Mombasa High Court, letter written to the Honourable The Chief Justice; by the Chairman of Mombasa Law Society, and e-mails by the said Chairman addressed to the members of Mombasa Law Society. Those notices related to the manner cases were to be fixed for hearing and or indicated that Mombasa High Court required more Judges to be posted to enable the case load in the Court to be adequately dealt with.

19. Plaintiff then responded to Defendant's claim that its witnesses have either died or cannot be traced thus-

"19. THAT with regard to the contents of paragraph 12 of the

said Affidavit, I state that:-

a. **The fact Mr. G. Kapacee left employment on the 7th February 2000 and passed away on 20th February 2004 and that Mr. P. Chauhan left employment in April 2003 cannot be a relevant factor as this suit could not have proceeded before 2004 by reason of the Defendant's own default in supplying the relevant particulars. This is not, consequently, a matter that can be attributed to the Plaintiff;**

b. **The non-availability of Mr. Mahendra F. Gandhi on account of his death in 2005 is not only irrelevant on account of the matters stated in sub-paragraph (a) above but more importantly because of the Defendant's own admission in its pleadings, the said Mr. Mahendra Gandhi was appointed receiver after the facts giving rise to the Plaintiff's cause of action had already occurred. In this respect, I shall crave leave to refer to the relevant pleadings and the Plaintiff's Advocate's letter of 6th December 1999, a copy of which I annex hereto marked 'SK-5';**

c. **The Defendant appears to be intent on using the alleged unavailability of personnel in a bid to gain the sympathy of the Court and a fanciful advantage.**

20. **THAT having considered this matter and the pleadings as well as the documentation, it is apparent that the case will largely be determined on documentary evidence. In fact, it is apparent from the documents supplied by the Defendant as part of the particulars that Mr. Mukesh Sanghavi, the deponent of the said Affidavit was personally involved in the matters giving rise to this action.**

20. The Defendant through a supplementary affidavit of Mukesh Sanghavi dated 26th February 2013 refuted the impression created through the affidavit of Khagram, in reply, that Advocates had been unable to fix matters for hearing before the Mombasa High Court from the year 2000 onward. In this regard Defendant deponed as follows-

> **"4. THAT it is important for the Court in assessing the Plaintiff's exhibit marked 'SK-4' to take into account the fact that there has been no steps towards prosecuting this action by the firm of A. B. Patel & Patel who took over the conduct of this matter on behalf of the Plaintiff on 25th July 2008 – well over four years ago. As it is evident, a chronological analysis of the exhibits marked 'SK-4' in the order they appear reveal that they either relate to Judges or Court's notifications that have no bearing on the inaction on the part of the Plaintiff or its advocates, for instance;**

i. **The notice dated 19th march 2008 relates to part-heard cases before Maraga, J and there is no evidence shown whatsoever to suggest that this matter was one of the matters affected since it has never been set down for trial.**
ii. **The email dated 18th February 2008 does not help matters either as it generally raises issues affecting administration of justice in Mombasa High Court.**
iii. **Whereas the notices dated 27th February 2009 and 23rd June 2009 respectively call upon advocates to fix matters, there is no evidence whatsoever that the Plaintiff's advocates either heeded this call or made any attempt to actually fix this matter for the second quarter of the year 2009.**
iv. **The email dated 15th October 2010 relates to the issue of redeployment of Judges and makes no reference to any attempt to fix this matter.**
v. **The notice of February 2011 has no bearing on this matter as this case was not one of the matters affected.**
vi. **Similarly the public notice has no evidential value as it is undated and in any event has no bearing on this matter.**

vii. **With regard to the notice dated 31st May 2011, there is no evidence that by then this matter had been fixed hence again it was not one of those matters affected.**

viii. **The email dated 10th June 2011 and the subsequent undated notices have no bearing on the fixing of this matter either. There is no evidence of any attempt made by the Plaintiff to fix this matter in the periods mentioned.**

ix. **Whereas on 24th February 2012, the Plaintiffs Advocates attempted to file in Court a list of their pending matters it is noteworthy that no attempts were ever made by them of fixing this particular matter.**

21. Defendant further deponed in the supplementary affidavit that the defence case raised a sharp dispute of facts surrounding the negotiation and agreement between Defendant and Plaintiff's Receiver and that therefore the issues cannot be determined by documents alone but that oral evidence would also be necessary.

DEFENDANT'S SUBMISSIONS

22. Defendant submitted both in writing and orally.

23. Defendant submitted that there had been a series of separate and inordinate inexcusable delays by the Plaintiff in prosecution of this suit such as to justify its dismissal. That the delay was so serious and contumelious such that it is no longer possible for the Defendant to have a fair trial. Defendant proceeded to give the chronological events leading to the Notice of Motion being considered viz-

1. **The Plaintiff, through C. B. Gor & Gor Advocates, filed the Plaint dated 14th July 2000 on 17th July 2000.**

2. **The Summons to Enter Appearance dated 14th July 2000 was served on the Defendants on 13th September 2000.**
3. **The Defendant filed its Memorandum of Appearance and Written Statement of Defence on 26th September 2000 and 3rd January 2001 respectively.**

4. **Pleadings closed on 24th February 2001 – over eleven and a half years ago.**

5. **The last pleading filed in this matter was by the Defendant who filed Further and Better Particulars of the Defence on 27th May 2003 – over nine years ago.**

6. **By consent the matter was fixed for hearing on 5th May 2004 – over ten years ago. However, the matter did not proceed on that day.**

7. **By a letter dated 13th July 2004 the Plaintiff's said Advocates invited the Defendant's Advocates to the Court Registry on 22nd July 2004 to list the matter for hearing. On that day, a hearing date could not be taken as the Court's diary was full.**

8. **No further steps were taken by the Plaintiff until four years later when, on 25th July 2008, the firm of A. B. Patel & Patel Advocates filed a Notice of Change of Advocates to come on record for the Plaintiff in place of C. B. Gor & Gor Advocates.**

9. **Since July 2008 a further four years elapsed and no further steps were taken in this action by the Plaintiff or its new Advocates – save for a mistaken attempt to list a spent Chamber Summons application for the provision of Further and Better Particulars by the Defendant on 28th November 2012.**

10. **This application to strike out the Plaintiff's action for want of prosecution dated 13th November 2012 was filed on the same date.**

11. **The Plaintiff's advocates thereafter purported to fix this matter for trial on 12th March 2013 notwithstanding the pendency of this application to strike out the suit.**

24. I am grateful to Defendant's Learned Advocate for the various authorities he provided to the Court. I will consider some of those cases for purpose of considering how the Courts have in the past dealt with similar applications.

25. In the case **ABDUL AND ANOTHER –Vs- HOME OVERSEAS INSCE CO. LTD [1971]E.A. 564** the Court referring to the dictum in **MUKISA BISCUIT CASE** stated-

> **"I am of the opinion that the provisions of the Civil Procedure Rules for the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter the Court's inherent jurisdiction to dismiss suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the Court."**

Defendant's reliance on that case was to show that the Court may dismiss a case for want of prosecution not only as provided under the Rules but also by invoking its inherent jurisdiction particularly to prevent abuse of the Court's process.

26. In the case **IVITA –Vs- KYUMBU [1984] KLR 441** the Court laid down the test to be applied by the Courts when considering an application for dismissal of suit for want of prosecution. The Court in that case held-

> **"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the Court."**

27. In the case **TRILL AND ANOTHER –Vs- SACHER AND ANOTHER [1993] IALL ER 961**; the Court in discussing the prejudice that may be considered as relevant to an application such as the one before Court stated viz-

> **"Prejudice to the Defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable. The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye witness or of a witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents."**

28. Defendant concluded by submitting that Plaintiff's delay has been excessive, flagrant and inordinate and would seriously prejudice a fair trial of this action.

PLAINTIFF'S SUBMISSIONS

29. Plaintiff also relied on written and oral submissions.

30. Plaintiff began by stating that the trial of this case will primarily depend on documentary evidence in so far as the question of the attornment, the receipt of teas and the authority of Defendant's employees was concerned.

31. In regard to Plaintiff's interpretation of Order 17 Rule 2 of the Civil Procedure Rules I am of the view the Plaintiff erred to say that the said Rule obligates both Defendant and Plaintiff to fix the case for hearing. I do not read such obligation in that Rule. Rule 2 (3) of that Order give any party the right to seek an order to dismiss a suit for want of prosecution. With that Rule not only can the Defendant seek to dismiss Plaintiff's suit for want of prosecution but the Plaintiff too can apply to dismiss Defendant's Counter Claim for want of prosecution.

32. Plaintiff submitted that when Defendant served the Notice of Motion on Plaintiff on 19th November 2012 Plaintiff had already invited Defendant to fix a hearing of the main suit by its letter of invitation dated 16th November 2012. What however I find needed explanation on the part of Plaintiff was why it had failed to fix a hearing of the main suit prior to November 2012, never mind that it sought to fix a date when Defendant had already filed its Notice of Motion under consideration.

33. Plaintiff in opposition to Defendant's Notice of Motion relied on the case **MOSES MURIIRA & 2 OTHERS –Vs- MAINGI KAMURU & ANOTHER (2013)eKLR** where the Court of Appeal faulted the High Court for dismissing a suit for want of prosecution when prosecution of the suit had been delayed by the parties engagement in negotiations to settle the dispute. That case is in that regard distinguishable from this one, since there has been no intimation by any of the parties that they are or were engaged in any negotiations.

34. Plaintiff also relied on the case **NAIROBI HIGH COURT CIVIL APPEAL NO. 737 OF 2002 CONCORDE CONTAINER SERVICES LTD –Vs- JOSEPH MUTHIKA KAGO & ANOTHER** where the Court stated-

> **"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. Finally the Court must consider whether the Defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the Plaintiff if his case is terminated summarily for a procedural default."** (emphasis provided)

35. In the case **SAGOO –Vs- BHARIJ [1990]KLR 459** the Court stated-

> **"It is not the practice of Court to exercise the drastic power of dismissing a suit unless there has been intentional, inordinate and excusable delay on the part of the Plaintiff …"**

36. Plaintiff is of the view that the Defendant's evidence can be adduced by means of documentary evidence and that accordingly the death of its members of staff was a red-herring used to portray alleged prejudice to Defendant.

37. That with difficulties Plaintiff faced alongside other parties, due to the problems of administration of justice at Mombasa High Court, Plaintiff's conduct should not be seen as intentional or inexcusable. Plaintiff submitted that if the suit was dismissed it faced the likelihood of loosing substantial sum of money and that "**it would be a travesty for this Honourable Court to dismiss this case.**"

ANALYSIS

38. I have considered the parties affidavits, their written and oral submissions and also their authorities.

39. The power to dismiss a suit for want of prosecution stems from Order 17 of the Civil Procedure Rules, 2010 and from the Court's inherent power and by the Court's application of the overriding provision.

40.Order 17 Rule 2(1) (2) and (3) provide-

"2(1) In any suit in which no application has been made or step

taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make

such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided

in sub-rule 1."

41.In this case Defendant has moved this Court under Rule 2(3) above. That provision is self explanatory. Defendant has invoked it to the effect that Plaintiff has failed to take steps in the suit in excess of one year.

42.The Court's inherent jurisdiction would be invoked by the Court to check any abuse of the Court process. That jurisdiction was ably discussed by the Learned Author Stuart Sime in the book '**A Practical Approach to Civil Procedure**' viz-

"Being the successor to the old common law court, the High Court has inherent jurisdiction to control its procedure to ensure its proceedings are not used to achieve injustice. Perhaps the most important statement on this subject is that of Lord Diplock in Bremer Vulkan Schieffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] AC 909 at 977, HL, where his Lordship said the High Court has-

'…. a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the State should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of Plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute."

For a party to fail to get on with a suit that it has filed without providing a reason for that failure is an abuse of the Court process. The Court in such a case would be right to invoke its inherent power.

43.Under Section 1B of the Civil Procedure Act the Court is duty bound to ensure timely disposal of the proceedings as one of the ways of achieving the overriding principle of Section 1A of that Act. Every Advocate is required under Section 1A(3) of that Act to assist the Court in achieving that overriding objective. It therefore follows that an Advocate is required to ensure the timely disposal of proceedings in Court.

44.In considering the Defendant's Notice of Motion I will be guided by the tests set out in the case of

IVITA (supra). The tests are two viz-

- **Was the Plaintiff's delay in bringing this suit to trial prolonged and inexcusable;**
- **If so can justice be done despite the delay.**

45. The matters relating to the subject of this suit occurred in 1998. Plaintiff filed this suit in July 2000. The Defence was filed on 3rd January 2001. Pleadings therefore closed in February 2001. It is noted that Plaintiff's Advocate did serve the Defendant with a Request For Particulars dated 31st January 2001. As stated before Defendant did not supply those particulars, on being requested and this led to Plaintiff filing a Chamber Summons dated 11th March 2001. A consent was entered into before Court on 6th May 2003 whereby Defendant was to supply those particulars. The particulars were filed in Court on 27th May 2003. The filing of those particulars may well explain why parties did not appear before Court on 3rd June 2005 when the matter came before Court for parties to confirm the Defendant had complied with the consent by filing and serving the particulars. It follows that the Plaintiff needed to explain the delay in fixing this case for hearing from June 2003 upto January 2004 when Plaintiff sent an invitation letter to Defendant to fix a date for hearing.

46. The case was fixed for hearing on 5th May 2004 but on that date it was adjourned at the instance of Defendant. Thereafter there was no activity in this matter until April 2005 when Plaintiff filed its List of Documents it intends to rely in proving its case. There is therefore a period of one year from 2004 to 2005 that Plaintiff needed to explain why no date was fixed.

47. From the date of filing its List of Documents, April 2005, the Plaintiff did seek to fix this case for hearing. In the year 2011 Plaintiff included this case in the list provided to Deputy Registrar of the Court. It is however to note that Plaintiff did not in giving that list invite the Defendant to fix a date.

48. The Plaintiff in order to explain the reason for not being able to fix this case for hearing has relied on various notices, correspondences and emails. What however I have noted is that some of those notices were undated and those that were dated some are of 2009 but the most relevant ones are the ones of the year 2011. The Plaintiff has failed to give any explanation of the period from the year 2005 upto 2011. Even the explanation given in respect to the year 2011 does not absolve the Plaintiff entirely because as correctly submitted by Defendant, even if the Mombasa High Court may at sometime in 2010 to 2011 have suffered with shortage of Judges, other cases were still being fixed for hearing during that period. Plaintiff fails to show what it did to try to get a hearing date.

49. It follows that there being no explanation of failure to fix this case between the year 2003 to 2004, that on its own is sufficient reason to dismiss suit for want of prosecution.

50. Further there being no explanation for the delay from the year 2005 to 2011 similarly is sufficient reason to dismiss this suit.

51. The next issue to consider is, even if there was that failure to fix the case for hearing can justice still be attained. There are two people, who the Defendant state were potential witnesses who died in the year 2004 and 2005.

52. Mr. Kapacee who the Defendant alleges released a list of the teas to Seyffert and who inturn released them to the Plaintiff, according to Defendant, was not authorized to do so or even to sign an undertaking to the effect that those teas would only be released on instruction of Plaintiff.

53. Plaintiff's case hinges squarely on the allegation that the Defendant breached that undertaking. It was therefore essential for the Court to receive oral evidence of Mr. Kapacee on firstly whether he

was authorized by Defendant to release the list and secondly whether he was authorized to give an undertaking on behalf of Defendant's Company. Mr. Kapacee died in 2004. The relevance of Mr. Kapacee's evidence can be seen in Plaintiff's Advocates own letter dated 6th December 1999 which is attached to Mr. Khagram's replying affidavit in this matter. The relevant portion of that letter is in the following terms-

"GM/DOCS/D/13/98/SZ **6.12.99**

Messrs Allied Wharfage Limited

P.O. Box 85353

MOMBASA

Dear Sirs

RE: SEYFFERT & COMPANY LIMITED

Duly instructed by Mr. M. F. Gandhi the duly appointed Receiver under the terms of the debenture created by the above company in favour of The Delphis Bank Limited we have to write to you as under:-

The above company was warehousing certain tea in your general and customs bonded warehouses pending export of the said tea outside Kenya. Under the debenture held by The Delphis Bank Limited the said tea was charged to The Delphis Bank Limited.

On the 26th day of June 1998 Mr. Shashikant Patel the Branch Manager of The Delphis Bank Limited in the company of Mr. Deli and Mr. Mwadime officers of The Delphis Bank Limited went to inspect the said tea at your godowns at Changamwe. Mr. Kapacee your warehouse Manager, (*emphasis provided***) took them around the warehouses and showed them the tea, which was at the time warehoused with you by the above company. Certain warehouse warrants were issued to The Delphis Bank Limited. Furthermore an undertaking was given to The Delphis Bank Limited stating that the tea stocks enumerated therein will be held by you pending further shipping disposal instruction in writing by The Delphis Bank Limited. On the basis of the said warehouse warrants and the undertaking the Bank did not appoint a Receiver immediately and take control of the said tea.**

Mr. Gandhi was subsequently appointed as a Receiver *(emphasis provided)* **on the 20th November 1998 and when he sought to take possession of the tea covered by the said warehouse warrants and the undertaking (less any tea that may be released pursuant to authorization by The Delphis Bank Limited) you did not give any tea to him.**

Please note that unless you release the said tea to our client within the next 15 days our instructions are to institute appropriate proceedings for its recovery holding liable for all costs.

Yours faithfully,

C. B. GOR

c.c The Manager

The Delphis Bank Limited

MOMBASA

c.c Mr. M. F. Gandhi, Receiver

MOMBASA."

54. What that letter shows is the full involvement of Mr. Kapacee in giving Plaintiff's representatives a tour of the warehouse and Defence has pleaded that he gave Plaintiff an undertaking. What occurred during that tour and led to the undertaking is now forever lost to Defendant following the death of Mr. Kapacee. It is without doubt that Defendant will be prejudiced if this case does proceed without reliance on the evidence of Mr. Kapacee. The prejudice is even that much more because the Defendant's other witness, Mr. Chauhan, the go-down Manager has since retired from Defendant's employment and cannot now be traced.

55. I also do not accept the argument advanced by Plaintiff's Learned Counsel that the death of the Plaintiff's Receiver Mr. Gandhi in 2005 cannot be prejudicial to Defence case. Even from the reproduced letter above it is clear that Mr. Gandhi played a pivotal role in the matters relating to the tea of Seyffert held by Defendant and the undertaking given. His absence will lead to this Court relying on documents produced by one who may not have been involved in the Receivership and who therefore, other than relying on those documents, cannot assist the Court to determine other discussions that took place at the material time. The Receiver's absence in my view is also highly prejudicial. This Court finds that there is a definite link between the delay to fix this case for hearing and the Court's inability to have a fair trial. I find that the Defendant, contrary to the arguments advanced by Plaintiff, did not substantially contribute to the delay in fixing this case for hearing. The delay is squarely at the door step of the Plaintiff.

56. It is as a result of the Court's finding above that I find that there is merit in Defendant's Notice of Motion. It does seem that the Plaintiff filed this case which it had no intentions of pursuing. I would only say, then '**let sleeping dogs lie**.' For the above reasons I grant the following orders-

a. **This case is hereby dismissed for want of prosecution with costs to the Defendant.**

b. **The Defendant is also awarded costs of Notice of Motion dated 13th November, 2012.**

DATED and delivered at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE